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in the

Supreme Court

of the

United States

OCTOBER TERM

No. 574

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

DEVELOPMENT CORPORATION OF AMERICA INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4052 — 371-4053

INDEX

	Page
REFERENCE TO OPINIONS BELOW	2
STATEMENT OF JURISDICTIONAL GROUNDS	2
ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
ARGUMENT	7
CERTIFICATE OF SERVICE	after App. 5

TABLE OF AUTHORITIES

Case	Page
Booske v. Gulf Ice Co., 24 Fla. 550, 5 So. 247, (Fla. 1888)	2, 6
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	9
Sewell v. Huffstetler, 83 Fla. 629, 93 So. 162 (Fla. 1922)	2, 6
Statutes:	
Title 28 U.S.C. § 1254(1)	2
Title 28 U.S.C. § 1332	3

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No. _____

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

DEVELOPMENT CORPORATION OF AMERICA INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, UNITED BONDING INSURANCE COMPANY, makes this its Petition for a Writ of Certiorari to the United States Court of Appeals, for the Fifth Circuit, and in support thereof would show:

REFERENCE TO OPINIONS BELOW

By this petition, Petitioner seeks a review of a decision of the United States Court of Appeals, Fifth Circuit. The opinion of the Court is appended to this petition as Appendix A. The opinion is unreported as of this writing.

STATEMENT OF JURISDICTIONAL GROUNDS

1. Judgment affirming the judgment of the District Court for the Southern District of Florida was entered June 25, 1969, by the United States Court of Appeals for the Fifth Circuit.

2. On July 30, 1969, the United States Court of Appeals, Fifth Circuit, denied UNITED BONDING INSURANCE COMPANY'S petition for rehearing.

3. Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254 (1).

ISSUES PRESENTED FOR REVIEW

1. Under the law of the State of Florida, may an obligee under a contractor's surety bond recover from a surety for breach of a contract different from the contract referred to and incorporated into the bond?

2. The Court erred in failing to apply the law of the State of Florida as enunciated by the Supreme Court of Florida in the cases of *Booske v. Gulf Ice Co.*, 24 Fla. 550, 5 So. 247, (Fla. 1888); *Sewell v. Huffstetler*, 83 Fla. 629, 93 So. 162 (Fla. 1922).

STATEMENT OF THE CASE

Jurisdiction in the District Court for the Southern District of Florida was predicated upon Title 28 U.S.C. § 1332.

Respondent, DEVELOPMENT CORPORATION OF AMERICA, INC., sued the Petitioner, UNITED BONDING INSURANCE COMPANY, as surety for International Electrical Contractors, Inc. (hereinafter called "International"), for damages suffered for an alleged breach of contract.

Petitioner, UNITED BONDING INSURANCE COMPANY, in its amended answer denied liability alleging that it did not bond the contract sued upon.

The case was tried without a jury. A final judgment was entered in favor of DEVELOPMENT CORPORATION OF AMERICA, INC.. UNITED BONDING INSURANCE COMPANY timely filed its motion for a new trial and its motion to amend the findings of fact. The Court entered an order partially amending the findings of fact and denying the motion for new trial. Notice of appeal was timely filed.

The Court of Appeals, Fifth Circuit, affirmed; a copy of the opinion appearing as Appendix A attached to this petition.

In 1964, DEVELOPMENT CORPORATION OF AMERICA, INC. became the general contractor for the construction of the Hollywood Towers Apartment, Hollywood, Florida. In pursuance of its contract, DEVELOP-

MENT CORPORATION OF AMERICA, INC. entered into negotiations for the furnishing and installation of the electrical work for the Hollywood Towers. In August, 1964, DEVELOPMENT CORPORATION OF AMERICA, INC. forwarded to International an unsigned purchase order agreement bearing the date August 10, 1964, (Pl. Ex. 2, Trial Exhibits). This contract was never signed by either DEVELOPMENT CORPORATION OF AMERICA, INC. or International.

On September 1, 1964, UNITED BONDING INSURANCE COMPANY signed a sub-contract bond CB-2563 in the amount of $210,000.00 with International, as principal, and DEVELOPMENT CORPORATION OF AMERICA, INC., as obligee, conditioned to a contract between DEVELOPMENT CORPORATION OF AMERICA, INC. and International dated the ____ day of August, 1964, which contract was referred to and incorporated into the bond (Pl. Ex. 6, Trial Exhibits).

Subsequently, on September 28, 1964, DEVELOPMENT CORPORATION OF AMERICA, INC. and International executed a contract. This September 28, 1964, contract (Pl. Ex. 5, Trial Exhibits) was the agreement whereby International carried on its work for the furnishing and installing the electrical work on Hollywood Towers; the September 28, 1964, contract being the only contract ever executed between DEVELOPMENT CORPORATION OF AMERICA and International.

In January, 1965, International allegedly defaulted on its contract.

Suit was brought by DEVELOPMENT CORPORATION OF AMERICA, INC. against UNITED BONDING INSURANCE COMPANY on bond CB-2563. UNITED BONDING INSURANCE COMPANY in its amended answer denied execution of the bond itself and in the alternative denied any liability under the bond since the bond No. CB-2563, issued September 1, 1964, was conditioned to a contract of August, 1964, and the damages DEVELOPMENT CORPORATION OF AMERICA, INC. sought, resulted from default on the part of International of a contract between International and DEVELOPMENT CORPORATION OF AMERICA, INC. dated September 28, 1964.

At trial, over objection of UNITED BONDING INSURANCE COMPANY, the Court received into evidence the contract dated September 28, 1964, and a xeroxed copy of UNITED BONDING INSURANCE COMPANY'S bond CB-2563 securing an August, 1964 contract.

At no time during the proceedings did DEVELOPMENT CORPORATION OF AMERICA, INC., by its pleading or testimony, seek to reform either the contract dated September 28, 1964, or the bond of UNITED BONDING INSURANCE COMPANY, dated September 1, 1964, purporting to secure a contract of August, 1964.

The Trial Court, in its amended findings of fact, found that UNITED BONDING INSURANCE COMPANY was paid a premium for writing the bond, but that this premium "was placed in escrow as a setoff against the sums due UNITED BONDING INSURANCE COMPANY by International Electrical Contractors, Inc." (App. 45, R. 865)

Upon appeal, the Court of Appeals, Fifth Circuit, affirmed the decision of the District Court and in so doing recognized the controlling Florida law enunciated by the Supreme Court of Florida in *Booske v. Gulf Ice Co.*, 24 Fla. 550, 5 So. 247, 250 (Fla. 1888):

> "a plea which sets up a contract different from and contradictory to the statements in the bond is bad, and may be taken advantage of on demurrer. It is a common rule, well established, that, in an action on a bond between the parties thereto, they are controlled by the recitals therein with reference to which the contract is made."

This principle was reaffirmed by the Supreme Court of Florida in the case of *Sewell v. Huffstetler*, 83 Fla. 629, 93 So. 162 (Fla. 1922).

The Court of Appeals, after reciting the rule as enunciated in *Booske v. Gulf Ice Co.*, supra., found that the rule was not applicable to the case under appeal, on the grounds that UNITED BONDING INSURANCE COMPANY had received and kept the money bargained for, i.e. the premium.

In so holding, the Court of Appeals overlooked the fact that the District Court in its amended findings of fact (App. 45, R. 865) held that the premium received by UNITED BONDING INSURANCE COMPANY from its principal International was placed in escrow as a setoff to cover money due UNITED BONDING INSURANCE COMPANY from International. The money due to UNITED BONDING INSURANCE COMPANY by International represents claims paid by UNITED BONDING INSURANCE COMPANY on other bonded jobs wherein International was principal and UNITED BONDING INSURANCE COMPANY was surety.

In its petition for rehearing, UNITED BONDING INSURANCE COMPANY brought to the attention of the Court of Appeals that the factual basis, (that UNITED BONDING INSURANCE COMPANY received and retained the premium) upon which the Court of Appeals declined to apply the law of the State of Florida, was erroneous and contrary to the facts recited in the District Court's amended findings of fact. UNITED BONDING INSURANCE COMPANY in its petition for rehearing urged that, based upon the facts set forth in the District Court's findings of fact, and amended findings of fact, the Court of Appeals was obligated to apply the law of the State of Florida and reverse the decision.

The Court of Appeals denied UNITED BONDING INSURANCE COMPANY'S petition for rehearing without opinion.

ARGUMENT

Based upon the facts of the case as enunciated by the District Court in its findings of fact, and amended findings of fact, the decision of the Court of Appeals, Fifth Circuit, is clearly erroneous.

It is clear that Respondent, DEVELOPMENT CORPORATION OF AMERICA, INC., sought to recover, and did recover a judgment from UNITED BONDING INSURANCE COMPANY, the surety, for breach of a contract which UNITED BONDING INSURANCE COMPANY did not bond. DEVELOPMENT CORPORATION OF AMERICA, INC. brought its action for damages resulting from a breach of a contract dated September 28,

1964. UNITED BONDING INSURANCE COMPANY'S bond signed September 1, 1964, secured a contract of a ____ day in August, 1964. The contract upon which DEVELOPMENT CORPORATION OF AMERICA, INC. bases its cause of action was not even executed until 27 days after the signing of UNITED BONDING INSURANCE COMPANY'S bond.

This case, being a suit on a sub-contract bond, is governed by the law of the State of Florida; and under Florida law, one who seeks to recover upon a contractor's bond for breach of a contract different from the contract referred to and incorporated into the bond has no cause of action.[1]

The Court of Appeals, Fifth Circuit, was clearly in error in its failure to apply the law of Florida, and reverse the case.

It is vitally important that this Honorable Court exercise its discretion and review the decision of the United States Court of Appeals, Fifth Circuit.

The law as enunciated by the Court of Appeals is clearly in error and contrary to the controlling decisions of the Supreme Court of the State of Florida. The decision, sought to be reviewed by this Honorable Court, has rewritten the basic surety law that a surety bond secures only the contract specifically referred to and incorporated into the bond. This decision will unfairly prejudice other surety companies doing business in the State of Florida, as well as the other states.

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[1] *Booske v. Gulf Ice Co.*, supra. See also *Sewell v. Huffstetler*, supra.

The Court of Appeals by its decision has clearly refused to apply the law of the State of Florida. The Federal Appellate Courts do not possess this discretion. The Court, in its failure to apply the applicable Florida Law, has violated the principle set down by this Honorable Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938).

In addition, the decision of the Court of Appeals, if not corrected, will make a suit on a contractor's bond more attractive in the Federal Courts (when jurisdiction is obtainable) than in the State Courts of Florida.

It is respectfully requested that this Honorable Court grant certiorari to review the decision of the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26984
Summary Calendar

DEVELOPMENT CORPORATION OF AMERICA, INC.,
Plaintiff-Appellee,

versus

UNITED BONDING INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(June 25, 1969)

Before BROWN, Chief Judge, THORNBERRY and MORGAN, Circuit Judges.

BROWN, Chief Judge: In this Florida diversity case, Plaintiff Development Corporation of America [DCA], sued on a performance bond issued by United Bonding Insurance Company [United] to secure the performance of a contract entered by United's principal, International Electrical Contractors [International]. Shortly after the beginning of the trial before the District Judge, United

announced in open court that it had authority to settle the matter, and after a recess the parties stipulated to the amount of damages, if allowed, in favor of DCA and against United in the sum of $125,000. However, United did reserve the right to appeal from any prior rulings of the District Court.

Taking advantage of its reservation, United now makes essentially two arguments for reversal. First, it alleges error in the admission into evidence of a photographic copy of the bond in question on the ground that DCA had not made a proper and adequate foundation for this departure from the "best evidence" rule. Second, United argues that it was error to admit both the copy of the bond and the copy of a contract incorporated by reference into the bond, and to render judgment based upon these documents. Finding these contentions to be without merit, we affirm the judgment below.[1]

The facts of this case are simple and undisputed. But we need not set them out since the appeal rests wholly upon two technical objections to evidence.

We consider first the question whether the District Court erred in admitting into evidence, over objection, a photographic copy of the bond sued upon. United's objection is founded upon the best evidence rule, the rule of evidence that requires the contents of an available written document to be proved by introduction of the document itself.

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[1]Pursuant to new Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the Clerk to place the case on the Summary Calendar and to notify the parties in writing. See Murphy v. Houma Well Service, 5 Cir., 1969, —— F.2d ——, Part I [No. 26902, slip opinion dated March 11, 1969].

There is nothing to this claim for two reasons. First, the sufficiency of the foundation laid for the admission of secondary evidence rests largely in the discretion of the Trial Court.[2] The determination of the Trial Judge on the admission of secondary evidence will not be distrubed in the absence of clear evidence of mistake amounting to an error of law. *Willhoit v. Commissioner*, 9 Cir., 1962, 308 F.2d 259. Second, and more important, United by formal answer to interrogatories admitted the genuineness (and authority of the executing agent) of the copy of the bond annexed to the complaint. That was enough. It was not an issue in the case, much less a matter for proof.[3]

This brings us to United's contention that the District Court erred in rendering judgment for DCA on the basis of the documents in evidence. The problem arises because the contract incorporated by the bond and described in the bond as dated August ____, 1964, was not in fact signed and dated until September 28, 1964. The facts reveal that DCA had conditioned the award of a contract on the acquisition by International of a performance bond. At the same time a form contract dated August 10, 1964, was drawn up and sent to International, but because of International's request for modifications, the contract was not signed until September 28. In the meantime, International had applied for a performance bond covering the August 10 contract, and the bond as issued by United contained an "erroneous" date of the contract to be bonded.[4]

---

[2]*E.G.*, Probst v. Presbyterian Church, 1889, 129 U.S. 182, ____ S.Ct. ____, 32 L.Ed. 642; Western, Inc. v. United States, 8 Cir., 1956, 234 F.2d 211; Atchison, T. & S.F.Ry. v. Jackson, 8 Cir., 1956, 235 F.2d 390. See generally 29 Am.Jur.2d *Evidence* §§459-62 (1967).

[3]If there is any doubt as to delivery (which we doubt), there was ample credible testimony to prove delivery.

[4]The date was "erroneous" in that the date of "August ____" became "September 28." The cause of this mistake was evidently United's assumption that the contract would be both modified, as requested by International, and signed within the month of August 1964.

Nothing could be plainer, therefore, than that the contract dated September 28 was in fact the one intended to be bonded by the parties. The sworn answers to interrogatories show that United received the premiums for the bond, paid the agent the originating commission, and has never refunded a thin dime to the principal or anyone else. Under these circumstances we find unavailing the supertechnical and hoary principle that "a plea which sets up a contract different from and contradictory to the statements in the bond is bad and may be taken advantage of on demurrer. It is a common rule, well established, that in an action or a bond between the parties thereto, they are controlled by the recitals therein with reference to which the contract is made." *Booske v. Gulf Ice Co.*, Fla., 1888, 24 Fla. 550, 5 So. 247, 250. See also *Sewell v. Huffstetler*, Fla., 1922, 83 Fla., 629, 93 So. 162.

It is, of course, our duty as a Federal Court to decide this case according to Florida law. United contends that the Florida cases compel a decision in its favor, although it cites no case directly in point. We decline to believe, however, that the Florida Courts, if they were confronted with this case — arising as it does from the fast-moving, high-pressure world of big business today — would apply rigidly or mechanically an old rule, developed in a different context, that would completely frustrate the obvious intent of the parties, which was vouchsafed by that safeguard of the business world — the receipt and retention of the money bargained for.

Moreover, everything points this way in the more recent Florida decisions. For example, Florida has adopted the principle that contracts of a surety for hire are construed most strongly in favor of the obligee. *National*

Union Fire Ins. Co. v. Robuck, Fla. Dist. Ct. App., 1967, 203 So.2d 204, *cert. denied*, 209 So.2d 672, 212 So.2d 809; *Lambert v. Heaton*, Fla. Dist. Ct. App., 1961, 134 So.2d 536; *Phoenix Indem. Co. v. Board of Public Instruction*, Fla. Dist. Ct. App., 1959, 114 So.2d 478. Likewise, it is the rule in Florida that a departure from a construction contract will not automatically relieve and exonerate a surety. If, however, there is a departure that results in injury to the surety, the surety will be relieved and discharged to the extent of its injury. *Gibbs v. Hartford Accident & Indem. Co.*, Fla., 1952, 62 So.2d 599.

AFFIRMED.

CERTIFICATE OF SERVICE

I, ERIK J. BLOMQVIST, JR., one of the attorneys for UNITED BONDING INSURANCE COMPANY, Petitioner herein and a member of the Bar of the Supreme Court of the United States hereby certify that on the 8th day of September, 1969, I served a copy of the foregoing Petition for Certiorari on JAMES E. GLASS, of Rosenberg, Rosenberg, Reisman & Glass, attorneys for Respondent, DEVELOPMENT CORPORATION OF AMERICA, by mailing a copy in a duly addressed envelope, with first class postage prepaid to JAMES E. GLASS, ESQ., 1002 Ainsley Building, Miami, Florida 33132.

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EME COURT U.S.

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UNITED BONDING INSURANCE COMPANY,
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DEVELOPMENT CORPORATION OF AMERICA INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX B

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MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
Findings of Fact and Conclusions of Law, of the U. S. District Court for the Southern District of Florida, dated July 3, 1968	1
Final Judgment dated July 3, 1968	5
Amended Findings of Fact of U. S. District Court dated September 10, 1968	6
Certificate of Service	9

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 67-50-Civ-TC

DEVELOPMENT CORPORATION OF AMERICA, INC., a Florida corporation,

Plaintiff,

vs.

UNITED BONDING INSURANCE COMPANY, an Indiana corporation,

Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came before the Court for trial pursuant to notice.

Prior to trial there was filed in this cause a Pre-Trial Stipulation and, upon the Pre-Trial Conference having been had, this Court entered its own Order on Pre-Trial Conference, which Order was filed May 28, 1968, directing the parties to meet in an attempt to arrive at further stipulations. Although requested and directed to do so by the Court, the parties were unable to arrive at any further stipulations so as to agree on all uncontested matters as originally directed by the Court's Order for Pre-Trial Conference. This inability to agree was made manifestly apparent at the trial with the position of the Defendant that the Defendant would put the Plaintiff to strict proof of the Plaintiff's claim. With this, the trial commenced and after the Court had overruled certain objections of the Defendant to proof and documentary evidence, the Defendant requested a recess and after the recess the parties stipulated to the entry of a final judgment without, however, waiving the Defendant's right to appeal as to any prior ruling of this Court.

Whereupon, the Court now makes the following

FINDINGS OF FACT

1. Plaintiff, DEVELOPMENT CORPORATION OF AMERICA, INC., is a Florida corporation with its principal place of business in the City of Hollywood, State of Florida.

2. Defendant, UNITED BONDING INSURANCE COMPANY, is an Indiana corporation, with its principal place of business in the City of Indianapolis, State of Indiana.

3. In 1964 DEVELOPMENT CORPORATION OF AMERICA, INC. became the general contractor for the construction of the Hollywood Towers Apartments, Hollywood, Florida, which construction was to be in accordance with the Plans and Specifications prepared by Charles F. McKirran & Associates.

4. DEVELOPMENT CORPORATION OF AMERICA, INC. negotiated with and awarded the furnishing and installation of the electrical work in the Hollywood Towers to INTERNATIONAL ELECTRICAL CONTRACTORS, INC. and in August 1964 gave written notice of this intention to INTERNATIONAL ELECTRICAL CONTRACTORS, INC., provided that INTERNATIONAL ELECTRICAL CONTRACTORS, INC. delivered a performance bond for the work.

5. A form contract for the electrical work between DEVELOPMENT CORPORATION OF AMERICA, INC. and INTERNATIONAL ELECTRICAL CONTRACTORS, INC. was prepared but not signed by either DEVELOPMENT CORPORATION OF AMERICA, INC. or INTERNATIONAL ELECTRICAL CONTRACTORS, INC. and thereafter INTERNATIONAL ELECTRICAL CONTRACTORS, INC. delivered to DEVELOPMENT CORPORATION OF AMERICA, INC. Bond No. CB-2563 of UNITED BONDING INSURANCE COMPANY, which was entered into by UNITED BONDING INSURANCE COMPANY on September 1, 1964, for which bond UNITED BONDING INSURANCE COMPANY received a premium, which premium has never been returned or repaid.

6. INTERNATIONAL ELECTRICAL CONTRACTORS, INC. commenced the performance of the electrical work but subsequently defaulted in January 1965. Upon the default of INTERNATIONAL ELECTRICAL CONTRACTORS, INC., DEVELOPMENT CORPORATION OF AMERICA, INC. immediately notified UNITED BONDING INSURANCE COMPANY of the default and with the consent of UNITED BONDING INSURANCE COMPANY, DEVELOPMENT CORPORATION OF AMERICA, INC. entered into a funding agreement with INTERNATIONAL ELECTRICAL CONTRACTORS, INC. whereby DEVELOPMENT CORPORATION OF AMERICA, INC. agreed to fund the job for INTERNATIONAL ELECTRICAL CONTRACTORS, INC. Thereafter DEVELOPMENT CORPORATION OF AMERICA, INC. kept UNITED BONDING INSURANCE COMPANY advised of job progress but subsequently in May 1965 UNITED BONDING INSURANCE COMPANY

notified DEVELOPMENT CORPORATION OF AMERICA, INC. that it had no liability under its performance bond. Immediately thereafter INTERNATIONAL ELECTRICAL CONTRACTORS, INC. removed its men and material from the Hollywood Towers job and it became necessary for DEVELOPMENT CORPORATION OF AMERICA, INC. to complete the electrical portion of the work by other means, and as a result of the default of INTERNATIONAL ELECTRICAL CONTRACTORS, INC. and the breach of the bond by UNITED BONDING INSURANCE COMPANY, DEVELOPMENT CORPORATION OF AMERICA, INC. suffered damages in the amount of One Hundred Twenty-five Thousand ($125,000.00) Dollars.

Based upon the foregoing facts and the Stipulation of the parties, this Court now enters its

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this matter under Title 28, *U.S.C.*, §1332.

2. Plaintiff, DEVELOPMENT CORPORATION OF AMERICA, INC., is entitled to a final judgment in its favor and against the Defendant, UNITED BONDING INSURANCE COMPANY, in the amount of ONE HUNDRED TWENTY-FIVE THOUSAND and no/100 ($125,000.00) DOLLARS, which judgment shall forthwith issue.

DONE and ORDERED, at Miami, Florida, this 3rd day of July, 1968.

TED CABOT
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 67-50-Civ-TC

DEVELOPMENT CORPORATION OF AMERICA, INC., a Florida corporation,

Plaintiff,

vs.

UNITED BONDING INSURANCE COMPANY, an Indiana corporation,

Defendant

FINAL JUDGMENT

This Court having heretofore entered its Findings of Fact and Conclusions of Law, it is

ORDERED and ADJUDGED that final judgment be and it hereby is entered in favor of Plaintiff, DEVELOPMENT CORPORATION OF AMERICA, INC., and against Defendant, UNITED BONDING INSURANCE COMPANY, and Plaintiff, DEVELOPMENT CORPORATION OF AMERICA, INC. do have and recover of and from the Defendant, UNITED BONDING INSURANCE COMPANY, the sum of ONE HUNDRED TWENTY-FIVE THOUSAND and no/100 ($125,000.00) DOLLARS, for which sum let execution issue.

DONE and ORDERED, at Miami, Florida, this 3rd day of July, 1968.

TED CABOT
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 67-50-Civ-TC

DEVELOPMENT CORPORATION OF AMERICA, INC., a Florida corporation,

Plaintiff,

vs.

UNITED BONDING INSURANCE COMPANY, an Indiana corporation,

Defendant

ORDER

Pursuant to notice this cause came before the Court upon the Defendant's Motion for New Trial and Motion to Amend the Findings of Fact, and the Court, after having considered the record herein and having heard argument of counsel, it is

ORDERED, that the Defendant's Motion for New Trial be and the same hereby is denied, and it is further

ORDERED, that the Defendant's Motion to Amend the Findings of Fact be and the same hereby is denied as to paragraphs 1 and 2 of the Motion but granted as to paragraphs 3 and 4 of the Motion, and the Findings of Fact be and they hereby are amended as follows:

Paragraph 5 of the Findings of Fact is amended to read as follows:

"5. A form contract for the electrical work between DEVELOPMENT CORPORATION OF AMERICA, INC. and INTERNATIONAL ELECTRICAL CONTRACTORS, INC. was prepared but not signed by either DEVELOPMENT CORPORATION OF AMERICA, INC. or INTERNATIONAL ELECTRICAL CONTRACTORS, INC. and thereafter INTERNATIONAL ELECTRICAL CONTRACTORS, INC. delivered to DEVELOPMENT CORPORATION OF AMERICA, INC. Bond No. CB-2563 of UNITED BONDING INSURANCE COMPANY, which was entered into by UNITED BONDING INSURANCE COMPANY on September 1, 1964, for which bond UNITED BONDING INSURANCE COMPANY received a premium, which premium has never been returned or repaid but was placed in escrow as a setoff against the sums due UNITED BONDING INSURANCE COMPANY by INTERNATIONAL ELECTRICAL CONTRACTORS, INC."

Paragraph 6 of the Findings of Fact is amended to read as follows:

"6. INTERNATIONAL ELECTRICAL CONTRACTORS, INC. commenced the performance of the electrical work but subsequently defaulted in January 1965. Upon the default of INTERNATIONAL ELECTRICAL CONTRACTORS,

INC., DEVELOPMENT CORPORATION OF AMERICA, INC. immediately notified UNITED BONDING INSURANCE COMPANY of the default and with the consent of UNITED BONDING INSURANCE COMPANY, DEVELOPMENT CORPORATION OF AMERICA, INC. entered into a funding agreement with INTERNATIONAL ELECTRICAL CONTRACTORS, INC. whereby DEVELOPMENT CORPORATION OF AMERICA, INC. agreed to fund the job for INTERNATIONAL ELECTRICAL CONTRACTORS, INC. In May 1965 UNITED BONDING INSURANCE COMPANY notified DEVELOPMENT CORPORATION OF AMERICA, INC. that it had no liability under its performance bond. Immediately thereafter INTERNATIONAL ELECTRICAL CONTRACTORS, INC. removed its men and material from the Hollywood Towers job and it became necessary for DEVELOPMENT CORPORATION OF AMERICA, INC. to complete the electrical portion of the work by other means, and as a result of the default of INTERNATIONAL ELECTRICAL CONTRACTORS, INC. and the breach of the bond by UNITED BONDING INSURANCE COMPANY, DEVELOPMENT CORPORATION OF AMERICA, INC. suffered damages in the amount of One Hundred Twenty-five Thousand ($125,000.00) Dollars."

DONE and ORDERED, at Miami, Florida, this 10 day of September, 1968.

TED CABOT
United States District Judge

CERTIFICATE OF SERVICE

I, ERIK J. BLOMQVIST, JR., one of the attorneys for UNITED BONDING INSURANCE COMPANY, Petitioner herein and a member of the Bar of the Supreme Court of the United States hereby certify that on the 24 day of September, 1969, I served a copy of the foregoing Appendix B on DONALD S. ROSENBERG, of Rosenberg, Rosenberg, Reisman & Glass, attorneys for Respondent, DEVELOPMENT CORPORATION OF AMERICA, by mailing a copy in a duly addressed envelope, with first class postage prepaid to DONALD S. ROSENBERG, 1002 Ainsley Building, Miami, Florida 33132.

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Supreme Court

of the

United States

October Term, 1969

No. 574

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

DEVELOPMENT CORPORATION OF AMERICA, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Preliminary Statement	1
Jurisdiction	2
Statement of the Case	3
Argument	5
Conclusion	9
Certificate of Service	10

CITATION OF AUTHORITIES

Case	Page
American Surety Co. of New York v. *Smith* (1930) 100 Fla. 1012, 130 So. 440	6
Booske v. Gulf Ice Co. 24 Fla. 550, 5 So. 247 (1888)	5
Brown v. *Avery* 63 Fla. 355, 58 So. 34 (1912)	6
Gibbs v. *Hartford Accident & Indemnity Co.* (Fla. 1952) 62 So.2d 599	7
Gruman v. *Sam Breedon Construction Co.* (2nd D.C.A. Fla. 1963) 148 So.2d 759	7
Lambert v. *Heaton* (1st D.C.A. Fla. 1961) 134 So.2d 536	6
National Union Fire Insurance Company of Pittsburgh, Pa. v. *Robuck* (1st D.C.A. Fla. 1967) 203 So.2d 204, *cert. denied* (Fla.) 209 So.2d 672, 212 So.2d 809	7
New York Indemnity Co. v. *May* (1931) 37 Ariz. 462, 295 P. 314	8
Sewell v. *Huffstetler* 83 Fla. 629, 93 So. 162 (1922)	5
MISCELLANEOUS:	
Supreme Court Rule 19	2

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PRELIMINARY STATEMENT

Petitioner, United Bonding Insurance Company, seeks review of a decision of the United States Court of Appeals, Fifth Circuit, which affirmed a Final Judgment, the entry of which was stipulated to by the Petitioner in the trial court.

For clarity, Petitioner, United Bonding Insurance Company will be referred to as "United" and the Respondent, Development Corporation of America, Inc. will be referred to as "DCA". Although not a party to this cause, United's principal on the surety bond, International Electrical Contractors, Inc., will be referred to as "International."

The following symbols will be used:

"R." for Record

"Ex." for Exhibit

"App." for Original Appendix in Court of Appeals

"App. B" for Appendix B

JURISDICTION

Although United seeks review by Writ of Certiorari, the Petition for Writ of Certiorari is not agreeable with Rule 19, Supreme Court Rules. The Court of Appeals did not render a decision in conflict with the decision of another court of appeals, nor did it decide a federal question or an important state question in conflict with the state law. Finally there are no special and important reasons for granting review on writ of certiorari for the decision merely settled a monetary dispute between two ordinary parties.

STATEMENT OF THE CASE

United's Statement of the Case does not detail the course of the proceedings and its disposition below nor does it contain all of the relevant facts. The Statement thus needs the following amplification:

DCA instituted this action against United upon a performance bond delivered to DCA in connection with a construction project known as "Hollywood Towers Apartments", wherein International was principal and United was surety. (R. 1-5)

Pursuant to notice the cause proceeded to trial before the District Judge, without a jury. The trial had barely commenced when United announced in open court that it had authority to settle the matter (App. 37; App. B 1) and after a recess the parties stipulated to the entry of a judgment in favor of DCA and against United in the total amount of $125,000.00 with United reserving the right to appeal as to any prior ruling of the court. (App. 38; App. B 1) The trial was then adjourned and the court entered its Findings of Fact and Conclusions of Law (App. 40-43; App. B 1-4) and thereupon entered the Final Judgment from which United appealed to the United States Court of Appeal, Fifth Circuit. The Court of Appeals affirmed the Final Judgment, and it is from this decision that United seeks review.

In 1964, DCA became the general contractor for the construction of the Hollywood Towers Apartments, Hollywood, Florida, which construction was to be in accordance with plans and specifications prepared by Charles F. McKirran & Associates. (App. 14; App. B 2) There were

various bidders on the electrical portion of the work and DCA made a determination to award the electrical work to International. (App. 15) On August 10, 1964, DCA notified International of its intent to award International the electrical work when International had complied with the acquisition of a performance bond. (P. Ex. 1; App. B 2) A contract between DCA and International, dated August 10, 1964, for the electrical work was drawn by DCA and submitted to International. (P. Ex. 2; App. 16-17) Included in the contract was certain optional work which, if eliminated, would result in deductions from the contract price. (P. Ex. 2)

Upon receipt of the form contract, International requested that the contract be modified (P. Ex. 3; App. 18) and made application through an agent for United to issue a performance bond. (P. Ex. 4) On September 1, 1964, International and United entered into a performance bond in favor of DCA which bond recited that International and DCA had entered into a contract for the electrical work for the Hollywood Towers Apartments, the date of which contract, however, was left blank. (P. Ex. 6) The original bond was delivered by International to DCA. (App. 20) Thereafter, pursuant to International's request, the form contract between International and DCA was revised and DCA and International signed the contract which bore the date September 28, 1964. (P. Ex. 5; App. 20)

Shortly after proceeding with the electrical work for the Hollywood Towers Apartments job, International commenced experiencing financial difficulties. (App. 22) In January, 1965, International went into default on the job and it became necessary for DCA to advance funds to meet International's payrolls and material invoices. (App. 22)

DCA notified United of this problem and volunteered to enter into a funding agreement with International so that International could complete the job. (P. Ex. 7) DCA then entered into a funding agreement with International whereby it agreed to fund the electrical work for International (Pl. Ex. 9), which procedure met with the approval of United. (Pl. Ex. 8) International continued on the job and as it progressed DCA sought approval from United for extraordinary disbursements of Funds. (P. Ex. 13; App. 24)

The job progressed until May 1965, when United advised DCA it had no liability for the completion of the electrical work (P. Ex. 12) and immediately thereafter International pulled its men and equipment from the job. (App. 25) DCA then proceeded to have the electrical portion of the work completed. (App. 27-29)

ARGUMENT

United's contention that the United States Court of Appeal, Fifth Circuit, failed to apply the law of Florida is without merit.

In support of this contention, United (as do all compensated sureties) relies on a 19th century case decided under the rule of *strictissimi juris*. This case, *Booske* v. *Gulf Ice Co.*, 24 Fla. 550 5 So.247 (1888), and the subsequent case of *Sewell* v. *Huffstetler*, 83 Fla. 629, 93 So.162 (1922) merely hold that where the terms of a bond sued upon are clear and unambiguous, the surety cannot set up a defense which seeks to lay the foundation for the intro-

duction of parol testimony to contradict the terms of the bond. This was the holding in *Booske* v. *Gulf Ice Co.* as clarified by the Supreme Court of Florida in *Brown* v. *Avery*, 63 Fla. 355, 58 So.34 (1912).

Even if United had correctly set forth the substantive law of Florida it would have had no application to the case at bar. This was not an action for breach of the contract between DCA and International as United suggests. It was an action on the performance bond which United saw fit to issue in blank to secure a contract between DCA and International, dated "August __, 1964". If the performance bond issued by United had been clear and unambiguous, and contained the specified date of the actual contract, United might then be in a position to argue that DCA could not recover on the bond. Even so, this argument would run contrary to the now substantive law of the State of Florida, for Florida long ago acknowledged the 20th century by commencing to minimize the rule of *strictissimi juris*. *American Surety Co. of New York* v. *Smith*, (1930) 100 Fla. 1012, 130 So.440. This acknowledgment in Florida has now developed to the point that the real inquiry is whether United's liability under its bond should be discharged because there was no contract dated "August __, 1964" and, if so, to what extent.

Florida has aligned itself with modern jurisprudence by recognizing that a compensated surety's obligation is coextensive with that of the principal and that contracts of a surety for hire are construed most strongly in favor of the obligee. *Lambert* v. *Heaton*, (1st D.C.A. Fla. 1961) 134 So.2d 536. Florida has also adopted the rule that a departure from a construction contract will not auto-

matically relieve and exonerate a surety, but, if there is a departure which results in injury to the surety, the surety will only be relieved and discharged to the extent of its injury. *Gibbs* v. *Hartford Accident & Indemnity Co.*, (Fla. 1952) 62 So.2d 599; *Gruman* v. *Sam Breedon Construction Co.*, (2nd D.C.A. Fla. 1963) 148 So.2d 759.

United's contention in this case is similar to the compensated surety's contention in the case of *National Union Fire Insurance Company of Pittsburgh, Pa.* v. *Robuck*, (1st D.C.A. Fla. 1967) 203 So.2d 204, *cert. denied* (Fla.) 209 So.2d 672,212 So.2d 809. In that case the principal presented to the surety a forged construction contract for a shopping center and the surety issued its bond. On appeal from an adverse judgment, the surety argued that it bonded only a fictitious contract and its obligation could not be extended in any manner. In rejecting this contention, the Florida appellate court held:

> "National Union undertook to bond the shopping center which was to be constructed by the principal Griggs. A Surety's obligation is generally coextensive with that of the principal, and contracts of a surety for hire are construed most strongly in favor of the obligee. A similar defense was presented in *New York Indemnity Co.* v. *May*, which held that it was the duty of the surety, before executing the bond, to satisfy itself as to the true terms of the building contract referred to in the bond."
> 203 So.2d 204, 206.

Interestingly enough, *New York Indemnity Co.* v. *May*, (1931) 37 Ariz. 462, 295 P. 314, relied upon by the Florida court in its opinion, involved a case where the date of the actual contract differed from the date of the contract recited in the surety's bond.

In the present case, it is obvious that United undertook to bond the electrical work for its principal, and in doing so it had the duty to satisfy itself as to the true terms of the contract referred to in its bond. Can it now be said that United discharged this duty when it saw fit to issue its bond securing a contract dated "August ____, 1964", (P. Ex. 6) while its principal was requesting that the actual contract be modified (P. Ex. 3) so as to reduce the exposure to both principal and surety?

Even if there was a departure from the contract dated "August ____, 1964" this would not relieve and exonerate United, for under Florida law United would only be relieved to the extent of its injury. Yet again, United elected to stipulate to a judgment for considerably less than the amount claimed by DCA (R. 3) rather than proceed at trial with proof that it was injured because there was no contract dated "August ____, 1964."

CONCLUSION

The decision of the United States Court of Appeals, Fifth Circuit, is not contrary to the substantive law of the State of Florida. Instead it acknowledges and adheres to the law of the State of Florida. Further, the decision is not in conflict with the decision of another court of appeal, nor does it decide a question of law that is important to the public. The decision merely affirmed a judgment, the entry of which was stipulated to in trial court, which is of interest only to the parties.

The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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